STATE OF MICHIGAN
IN THE SUPREME COURT

MARYANN DONOHO,

Plaintiff-Appellee,

v

WALMART STORES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Appellants.

COA#: 256525

LC#: 03-000235

/

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BRIEF IN OPPOSITION
TO
APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee accepts Defendants-Appellant's statement of jurisdiction.

COUNTER-STATEMENT OF ISSUE INVOLVED

WHERE MEDICAL BENEFITS ARE AWARDED BY THE MAGISTRATE IN A WORKERS' COMPENSATION CASE AND DURING THE PENDENCY OF AN APPEAL DEFENDANTS DID NOT PAY PLAINTIFF'S MEDICAL BENEFITS AND FOLLOWING ENTRY OF ORDER AFFIRMING THE MAGISTRATES' AWARD, WHICH DEFENDANTS DID NOT APPEAL, DEFENDANTS CONTINUED NOT TO PAY THE AWARDED MEDICAL BENEFITS, BOTH OF WHICH ARE CONTRARY TO THE WORKERS' COMPENSATION ACT, DOES A WORKERS' COMPENSATION MAGISTRATE HAVE AUTHORITY UNDER MCL 418.315(1) TO ORDER DEFENDANTS TO PAY ATTORNEY FEES?

Plaintiff-Appellee says "Yes"

Magistrate says "Yes"

The Appellate Commission says "Yes"

The Court of Appeals denied Defendants' Application for Leave to Appeal

Defendants-Appellants say "No"

COUNTER-STATEMENT OF FACTS

Plaintiff was injured while working for Wal-Mart in 1998 and 1999. In April 1999 Plaintiff filed an Application for Hearing with the Workers' Compensation Bureau. (Exhibit 1) The case was tried in February 2001. The magistrate's decision in May 2001 granted Plaintiff an open award of workers' compensation wage loss benefits and medical benefits related to specific conditions. (Exhibit 2)

Defendants appealed the magistrates' decision to the Workers' Compensation Appellate Commission.

The Appellate Commission affirmed the decision of the magistrate in an Order mailed in June 2002. (Exhibit 3). Defendants did not appeal the decision of the Appellate Commission. Defendants also did not pay Plaintiff's medical benefits.

Prior to the decision of the Appellate Commission, while the above appeal was pending, Plaintiff filed a petition asking for imposition of a penalty, due to Defendants' failure to pay medical benefits, mileage and other related expenses. (Exhibit 4). Plaintiff's penalty petition proceeded to trial in April 2003. At that time, despite the passage of two years since Defendants had been ordered to do so and the passage of one year since their appeal had been denied, Defendants still had not paid Plaintiff's medical bills, mileage and other related expenses, some of which dated back to 1998. (Exhibit 5). After the hearing, the magistrate issued his decision (Exhibit 6) which:

a. Ordered Defendants to pay Plaintiff's medical benefits which were documented in an exhibit which was submitted at trial;

b. Ordered Defendants to reimburse Plaintiff for lodging, meals and mileage according to the Standard Travel Regulations;

c. Ordered Defendants to reimburse Plaintiff for meals and lodging of the person who assisted Plaintiff with attending medical appointments;

d. Denied Plaintiff's request for household assistance;

e. Ordered Defendants to pay a penalty of $1500 for failing to pay medical benefits within 30 days;

f. Ordered Defendants to pay Plaintiff's counsel a 30% attorney fee on the unpaid medical bills and related expenses pursuant to MCL 418.315(1) and the case law interpreting that section.

Defendants appealed the attorney fee award to the Workers' Compensation Appellate Commission. In an opinion and order mailed June 8, 2004, the Appellate Commission affirmed the decision of the magistrate.

Defendants now seek leave to appeal this June 8, 2004 decision of the Appellate Commission.

ARGUMENT

Plaintiff applied for workers' compensation benefits in 1999 and in May 2001 was awarded wage loss and medical benefits. Defendants appealed. When medical benefits are awarded and an appeal is taken, the Workers' Compensation Act, MCL 418.862, requires Defendants, while the appeal is pending, to pay medical benefits which were incurred after entry of the award. In violation of the statute, Defendants did not pay Plaintiff's medical benefits.

The Appellate Commission affirmed the magistrate's award on June 28, 2002. Defendants did not appeal this decision, which thus became the order of the bureau. At that point Defendants were responsible, not just for the medical benefits incurred after entry of the May 2001 order, but for medical benefits incurred prior to that date, as well. Nonetheless, Defendants still did not pay Plaintiff's medical benefits.

While Defendants' appeal was pending Plaintiff had filed a petition asking for imposition of a penalty due to Defendants' failure to pay benefits as ordered. Plaintiff's penalty petition was heard by a magistrate in April 2003, by which time Defendants still had not paid Plaintiff's medical benefits. Following this hearing, the magistrate ordered Defendants to pay a 30% attorney fee on the unpaid medical benefits. The award was based on MCL 418.315.

Under circumstances such as these, MCL 418.315(1) authorizes an award of attorney fees in addition to payment of medical benefits. In pertinent part, MCL 418.315 (1) provides:

> "The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. * * * The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. <u>If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the</u>

worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." [emphasis added.]

The Court of Appeals has interpreted section 315(1) as authorizing magistrates to require the employer/insurance carrier to pay attorney fees when the recovery of medical benefits is involved. In *Boyce v. Grand Rapids Asphalt Paving Co.,* 117 Mich App 546, 550-551 (1982), the court held that an attorney could not receive a fee for recovering medical benefits because under the then existing workers' compensation rules, medical benefits were treated as "costs" of litigation to be deducted from the total recovery before the computation of an attorney fee. As the court noted, that rule has since been eliminated.

In *Zeeland Hospital v VanderWal,* 134 Mich App 815, 824 (1984) the Court of Appeals held:

"The pertinent portion of the statute provides:

'If the employer fails, neglects, or refuses [to furnish medical care to the employee], the employee shall be reimbursed for the reasonable expenses paid by the employee; or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the hearing referee. The hearing referee may prorate attorney fees at the contingent fee rate paid by the employee.' MCL 418.315(1)

Since the clause concerning attorney fees follows the clause concerning the employer's refusal to pay the employee's reasonable medical expenses, **the final sentence is logically construed to require either the employer or the insurance carrier to pay a portion of defendant's attorney's fees."** [emphasis added]

The Court of Appeals in *Nezdropa v. Wayne County,* 152 Mich.App. 451, 470-471 (1986) had the opportunity to hold that MCL 418.315 did not allow the award of an attorney fee, but instead resorted to the workers' compensation rule that characterized medical benefits as litigation expenses:

"While the final sentence could be construed to require Wayne County to pay plaintiff's attorney fee, it must be interpreted in light of the administrative rules of the Bureau of Workers' Disability Compensation. Rule 14, which was in effect on the date of plaintiff's injury, contains the following subrule:

'(2) In a case tried to completion with proofs closed or compensation voluntarily paid, an attorney shall first deduct the reasonable expenses from the accrued compensation which have been incurred by the plaintiff. The fee which the referee may approve shall not be more than 30% of the balance." 1972 AACS, R 408.44.

> Reasonable expenses, listed in subrule 5, include hospital and medical expenses. Thus, under the rule, "an attorney cannot recover a percentage fee for any portion of compensation recovery which represents accrued medical expenses'. *Boyce, supra*, 117 Mich.App. p. 551, 324 N.W.2d 28.
>
> As footnote 1, page 551 of *Boyce, supra,* points out, the rule was amended in 1979, deleting hospital and medical expenses from the list of reasonable expenses. This case was previously remanded to the WCAB for determination of whether the "pertinent events" occurred subsequent to the 1979 amendment, thus making Wayne County liable for payment of the attorney's fee. The WCAB determined that the assignment, plaintiff's attorney's efforts, and the hearings in this matter all occurred after the 1979 amendment and ordered Wayne County to pay the attorney's fees. That directive was vacated by this Court on September 5, 1984. According to our reading of *Boyce,* the pertinent event is the date of plaintiff's injury. Although footnote 1 in *Boyce* does mention the contingency fee contract between the plaintiff and the attorney, we find that the implicit holding of *Boyce* is that the date of the injury controls. In the present case, plaintiff Nezdropa alleges his injury occurred in January, 1976, long before the 1979 amendment of Rule 14. Thus, Wayne County is not liable to plaintiff's attorney for attorney fees on the amount reimbursable to Blue Cross."

This has also been the longstanding practice of the Bureau of Workers' Disability Compensation. And the Workers' Compensation Appellate Commission, when it has had the opportunity to do so, has confirmed the authority of the magistrate to award attorney fees to plaintiff's counsel against an employer or its insurance carrier for the recovery of medical benefits. See, for example, *Sikkema v Taylor Carving*, 1992 ACO 469; 1992 Mich ACO 1420; *Stankovic v Kasle Steel Corporation*, 2000 Mich ACO 437.

This practice, like the statute on which it is founded, is based on the recognition that if magistrates had no power to award attorney fees for the recovery of medical benefits, may injured workers would be unable to get medical benefits if they were not paid voluntarily. The court in *Boyce, supra, 551-552* explained the public policy rationale:

> "[A]n attorney may be reluctant to take a case in which accrued compensation is small but where accrued and unpaid medical benefits are substantial if he cannot recover his fee from the medical benefits portion of the award. In such a case, the potential fee might not merit the necessary effort.

* * *

'[I]t might not be appropriate to award attorney fees for expenses for medical services in those situations where it later turns out that the employer did not have the slightest notice or knowledge that they were needed or did not in any manner fail to neglect to provide or pay for such services.'
"In other cases, however, where the employer or its insurance carrier is guilty of a breach of the statutory duty to provide medical care or to pay for medical care in a timely fashion then the employer or its carrier, and not the employee, should bear the burden of the attorney fees. As a matter of policy, where an employer or an insurance carrier refuses to pay mandatory medical benefits, justice would be served by requiring the employer or the insurance carrier to pay the attorney fees of plaintiff's counsel." [emphasis added]

It may well have been in recognition of these public policy ramifications that the Legislature enacted MCL 418.315.

The Legislature empowered the director of the Bureau to establish by rule the maximum attorney fees. MCL 418.858. When an injured worker recovers wage loss benefits, his/her attorney fee is paid on a contingent fee basis out of the recovered wage loss benefits. R408.44 The Legislature, however, clearly had something additional in mind with regard to attorney fees on recovered medical benefits when it enacted MCL 418.315:

"If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses maybe owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee."

Among whom is the magistrate to "prorate attorney fees"? Defendants assert that the medical care providers, the doctors and hospitals, are to bear the burden when the insurance company and employer wrongfully fail to provide medical care to the injured worker. Unfortunately for that argument, the Court of Appeals, both in *Boyce, supra,* and *Zeeland Hospital, supra,* has held to the contrary. In both cases the Court held that an attorney fee cannot be withheld from the payment to a doctor or hospital because the medical care provider did not retain the attorney. It therefore being the law that a medical care provider cannot be required to pay an attorney fee on the medical benefits

recovered through the efforts of the attorney, the only possible remaining persons among whom the attorney fee can be allocated are the employer and its insurance carrier.

If Defendants are correct when they assert that the magistrate has no authority to require the employer and its insurance carrier to pay attorney fees on medical benefits, then the Legislature's pronouncement in MCL 418.315 is meaningless. "It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecommunications Complaint,* 460 Mich 396, 414 (1996); *Nawrocki v. Macomb County Road Commission*, 463 Mich 143, 160 (2000).

> "The primary purpose of statutory construction is to discover and give effect to the intent of the Legislature. Where the statutory language is of doubtful meaning, a reasonable construction must be given, looking to the purpose of the act. The statute's spirit and purpose should prevail over its strict letter." *State Treasurer v. Wilson,* 423 Mich 138, 144 (1985)

The Worker's Disability Compensation Act is a remedial statute, and as such must be liberally construed to grant rather than deny benefits. *Sanchez v Eagle Alloy Inc.*, 254 Mich App 651, 659 (2003)

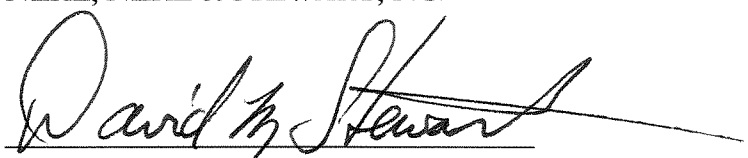
Applying these principals to MCL 418.315, it is clear that the workers' compensation magistrate in the present case had the authority to order Defendants to pay a 30% attorney fee on the medical benefits they had been ordered to pay.

RELIEF REQUESTED

The application for leave to appeal should be denied.

Respectfully submitted,

NEAL, NEAL & STEWART, P.C.



Dated: December 10, 2004

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